

Food for Thought on Forfeiture

In the landlord and tenant relationship, a right to forfeit imposes the ultimate sanction. Katie Dunn considers this right, which allows a landlord to terminate the lease in certain specified circumstances, usually a breach of the tenant's covenants or other conditions.

Whilst forfeiture sounds like an attractive mechanism for landlords seeking to remove a defaulting tenant, it is not the end of the story. The tenant can apply to the court for relief against forfeiture. The courts have a discretion when deciding whether to use their jurisdiction to grant the tenant relief, but it is not always an easy one to exercise. As recent case law shows, there is a balance to be struck between allowing the landlord to enforce their property rights and giving the tenant a second chance. This is particularly so when the advantage to the landlord in being able to forfeit is out of all proportion to the seriousness of the breach and the harm the landlord has suffered.

Restaurant Rows

The tenant in *Magnic Limited v Ul-Hassan [2015]*¹ ran a pizza restaurant from the premises without satisfying planning conditions, in breach of the lease. The landlord refused to allow the tenant to install a fume extraction system to the exterior of the premises, which was required to satisfy planning conditions, and sought to forfeit the lease.

The court confirmed that relief would be granted provided that the tenant ceased trading from the premises as a pizza restaurant by 11 February 2011. The tenant appealed and continued to trade in the mistaken belief that its application for permission to appeal had the effect of extending the deadline.

By the time the case reached the Court of Appeal, the dispute concerning the tenant's unlawful use of the premises had been on-going for over five years. However, the Court found that the tenant's failure to cease trading was not a deliberate breach of the conditions for relief, but instead was founded on erroneous legal advice. The tenant remedied the breach by ceasing to trade by the time of the appeal hearing. Accordingly, relief was allowed.

The Court may have had some sympathy for the tenant because they had at least attempted to comply with planning conditions.

In *Freifeld v West Kensington Court Limited [2015]*² the tenant had a valuable long leasehold interest. Their

sub-tenants had mismanaged the Chinese restaurant operated from the premises to such a degree that it caused a nuisance to residential tenants in the same building and led to the landlord's insurer refusing to renew the building's insurance policy. The tenant then granted a future sublease to the restaurant owners without the landlord's consent, in breach of the lease. The landlord sought to forfeit the lease. The court refused relief on the basis of the tenant's conduct and failure to make any attempt to remedy the deliberate breach until the eleventh hour.

The Court of Appeal, however, granted relief. It accepted that there may be cases where a lease of substantial value could pass to the landlord by forfeiture, but only where there was no other way of securing the performance of the covenant. Relief was given subject to conditions requiring the tenant to appoint new managing agents and assign the lease within six months.

These cases show that a tenant's persistent and even deliberate breach of the lease is no bar to relief. This means that landlords can face a period of uncertainty following forfeiture.

Windfall Wars

The court in *Pineport Limited v Grange Glen Limited [2016]*³ granted the tenant's application for relief, even though it was made 14 months after forfeiture. The court took account of human factors, including the tenant's custodial sentence for unlawful activity conducted from the premises, and financial and health issues suffered as a result. In the circumstances, the court decided that the tenant had acted with "reasonable promptitude". It was also satisfied that the tenant was capable of paying the amount due to the landlord, even though the landlord had to wait up to a further 16 weeks for payment.

¹EWCA Civ 224

²EWCA Civ 806

³EWHC 1318 (Ch)

Again, the tenant in the case held a long and potentially valuable lease. Forfeiture meant that the landlord would receive a windfall. The court took this into account, particularly as it was unable to point to any long term detriment suffered by the landlord.

Administration Arguments

When a tenant enters administration, the landlord faces an additional hurdle: it must seek the court's permission before it is able to forfeit.

*Lazari Investments Limited v SSRL Realisations Limited (in administration) [2015]*⁴ reflects the approach taken by the courts in these circumstances.

The administrators of the Strada restaurant chain sought to assign the lease to a buyer of the business and allowed them into occupation in breach of covenant.

Having decided that forfeiture would be detrimental to the purposes of the administration, the court balanced the landlord's proprietary interests against the interests of the unsecured creditors as a whole. The landlord had received two favourable offers to take a new lease of the

premises. The tenant's administrators stood to gain £1.3 million from the assignment, but the landlord had refused consent to assign and validly terminated a licence arrangement that was key to any assignment. In the circumstances, permission to forfeit was granted.

The case provides some much needed good news for landlords, but getting permission to forfeit does not stop a tenant seeking relief. A landlord may find that they have won the first skirmish, but the fight is not over.

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⁴EWHC 2590 (Ch)

